

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of:

Wireless Telecommunications Bureau Seeks)	
Comment on National Railroad Passenger)	
Corporation (Amtrak) Request for Waiver of)	WT Docket No. 11-27
Certain Part 80 Automated Maritime)	DA 11-322
Telecommunications System (AMTS) Rules to)	
Implement Positive Train Control)	

REPLY COMMENTS

The National Railroad Passenger Corporation ("Amtrak") hereby replies to the two oppositions – filed by Skybridge Spectrum Foundation, et al. (hereinafter, "Havens")¹ and Hammett & Edison, Inc.² ("H&E", and collectively with Havens the "Opponents") – interposed against the above-captioned Waiver Request.³ Opponents fail to raise any significant issues that would preclude grant of the waiver – indeed, neither of the Opponents provides any engineering

¹ Warren C. Havens, et al., Comments including Petition for Reconsideration and Motion to Dismiss, filed by Skybridge Spectrum Foundation, ALTIS Wireless LLC, V2G LLC, Environmental LLC, Verde Systems LLC, Telesaurus Holdings GB LLC, and Intelligent Transportation & Monitoring Wireless, LLC, WT Docket No. 11-27 (filed March 11, 2011) ("Havens Comments"). Mr. Havens also filed a Petition for Reconsideration and Motion to Dismiss ("Havens Petition") in response to the captioned Public Notice on February 25, 2011, to which Amtrak has already responded. *See* Amtrak's Opposition to Petition for Reconsideration and Motion to Dismiss (filed March 10, 2011). To avoid wasting staff or Amtrak resources, Amtrak incorporates, by reference, its responses in its Opposition that address arguments in Havens Comments that are simply restated from the Havens Petition. Amtrak also will not respond to the litany of extraneous allegations/grievances labeled Equitable and Other Matters that Havens describes as "not making any argument or request for information . . ." Havens Comments at 8.

² Comments of Hammett & Edison, Consulting Engineers, WT Docket No. 11-27 (filed March 8, 2011) ("H&E Comments").

³ Wireless Telecommunications Bureau Seeks Comment on National Railroad Passenger Corporation (Amtrak) Request for Waiver of Certain Part 80 Automated Maritime Telecommunications System (AMTS) Rules to Implement Positive Train Control, Public Notice, DA 11-322 (WTB rel. Feb. 18, 2011) ("Public Notice"). Amtrak recognizes that the Bureau only sought comments on the appropriateness of the waivers as a technical matter, and appropriately reserved consideration of any other issues that might arise in the context of Amtrak's request for consent to the assignment of a specific license in the AMTS band until Amtrak is successful in acquiring the rights to an AMTS license in the secondary market.

or other technical evidence that Amtrak's use of the AMTS spectrum with the current technical requirements waived would negatively impact any other AMTS licensee, disserve the purpose for which the existing rules were imposed or otherwise fail to serve the public interest. In contrast, Amtrak and the three parties who filed supporting comments – the American Association of Railroads ("AAR"), PTC-220, LLC ("PTC-220") and the Southern California Regional Rail Authority ("SCRRA")⁴ – have demonstrated that important public interest benefits would result from the grant of the requested waivers and Amtrak's ability to deploy a positive train control ("PTC") system using spectrum allocated to the Automated Maritime Telecommunications System ("AMTS") radio service. Accordingly, the Waiver Request should be granted.

INTRODUCTION AND BACKGROUND

In the Waiver Request, Amtrak seeks Commission confirmation that it will waive certain Part 80 technical rules so that Amtrak may pursue the secondary market acquisition of licenses for, and fully utilize frequencies in, the Automated Maritime Telecommunications System ("AMTS") band in order to deploy a PTC system in 35 select counties within its northeast corridor.⁵ Amtrak, like other rail carriers, is obligated to develop and deploy an interoperable PTC system on its rail lines no later than December 31, 2015 to address the substantial public interest concerns raised in the Rail Safety Improvement Act of 2008.⁶ As the legislative history explains:

⁴ See Comments of the American Association of Railroads, WT Docket No. 11-27 (filed March 11, 2011) ("AAR Comments"), PTC-220, LLC, WT Docket No. 11-27 (filed March 11, 2011) ("PTC-220 Comments"), and the Southern California Regional Rail Authority, WT Docket No. 11-27 (filed March 14, 2011) ("SCRRA Comments").

⁵ See Public Notice at 1.

⁶ Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (2008). Because of the importance of PTC to rail safety, Amtrak has adopted an earlier deadline of late 2012 as its self-imposed objective for implementing PTC on its Northeast Corridor network.

40 percent of all train accidents [per the Federal Railroad Administration] are the result of human factors. According to the [National Transportation Safety Board], technological solutions, such as positive train control, have great potential to reduce the number of serious train accidents by providing safety redundant systems to protect against such human performance failures. [Consequently], [p]ositive train control has been on the NTSB's list of most wanted safety improvements for 17 years.⁷

The legislative history also cites a report by the Railroad Safety Advisory Committee concluding that "out of a select group of 6,400 accidents that occurred from 1998 through 1997, 2,659 of those accidents could have been prevented had some form of positive train control been implemented."⁸ Without question, and as confirmed in the supporting comments of AAR, SCCRA and PTC-220, the use of FCC licensed spectrum for the development and implementation of PTC systems serves the public interest.

After completing extensive spectrum research and a broad-based public process seeking offers for the sale of licenses in the spectrum range 218-222 MHz⁹ that might be available in the secondary market, Amtrak identified the AMTS band as the most suitable spectrum in which it could obtain sufficient spectrum covering the required geographic areas for its PTC solution, known as an Advanced Civil Speed Enforcement System ("ACSES"). In order to utilize AMTS spectrum for this purpose, however, Amtrak will need relief from certain of the FCC's Part 80 technical rules. Before spending additional resources in pursuing and finalizing purchase agreements with potential assignors of spectrum in this radio service, Amtrak appropriately sought Bureau guidance, through the vehicle of the Waiver Request, as to the availability of the required waivers.

⁷ H. REP. NO. 110-336, at 44 (2008), *reprinted in* 1978 U.S.C.C.A.N. 2142, 2161.

⁸ *Id.* at 45.

⁹ As noted in the Waiver Request and the comments of AAR, SCCRA and PTC-220, this range was chosen by the rail industry, generally, to assure equipment compatibility and interoperability with other railroads operating on the same, or closely proximate lines.

I. THE BUREAU HAS AMPLE AUTHORITY TO ACT ON THE WAIVER REQUEST

As a preliminary procedural matter, Havens argues that Section 0.131(a) of the Commission's rules does not authorize the Bureau to act on rule waiver requests filed by non-licensees.¹⁰ This is simply inaccurate. Section 0.131(a) expressly provides that the Bureau holds delegated authority to act "in all matters *pertaining to* the licensing and regulation of wireless telecommunications, including . . . acting on waivers of rules."¹¹ Amtrak's Waiver Request clearly pertains to the licensing and regulation of wireless telecommunications, and is thus well within the Bureau's authority to approve.

Nor is this a matter of first impression for the Bureau, as the Waiver Request seeks the same type of relief granted to other rail carriers to allow them to use a similarly restricted radio band for PTC system purposes. For example, in 2003, at the request of the AAR, the Bureau waived numerous, analogous technical rules applicable to operations in the 220 MHz band in order to facilitate PTC system deployment.¹² Specifically, the Bureau found that the benefits to "public safety, spectrum efficiency, and spectrum flexibility . . ." would serve the public interest, and thus waiver of various technical rules was warranted.¹³ The same substantial public interest benefits will result in this instance, which is why the AAR, PTC-220 and the SCRRRA each strongly supports the Waiver Request.¹⁴

¹⁰ Havens Comments at 5 – 6. Havens also argues that Amtrak lacks standing to seek a waiver, but fails to cite a single case concluding that either Section 1.3 or 1.925(b)(3)(ii) limits waiver requests to licensees. The cases he cites are inapposite and relate to Article III standing for purposes of seeking review of an FCC decision.

¹¹ 47 C.F.R. § 0.131(a) (emphasis added)

¹² *Application for Consent to the Assignment of a Five-Channel 220 MHz Nationwide License to the Association of American Railroads*, Order, 18 FCC Rcd 24711 (WTB 2003)

¹³ *Id.* at 18 FCC Rcd 24714. In 2009, the Bureau granted a similar waiver request filed by PTC-220 based on the "substantial public interest benefits that will accrue from a nationwide interoperable rail safety network." *Request of PTC-220, LLC for Waivers of Certain 220 MHz Rules*, Memorandum Opinion and Order, 24 FCC Rcd 8537, 8544 (WTB 2009)

¹⁴ AAR Comments at 2; PTC-220 Comments at 1; SCRRRA Comments at 1.

Nor is there any reason why the Bureau must initiate a rulemaking proceeding in order to grant the relief sought in the Waiver Request as suggested by H&E. The scope of the requested relief does not “constitute a *de facto* request for rulemaking”¹⁵ as they suggest. To the contrary, Amtrak is not asking the Bureau to change the rules generally, or even to apply its waiver request to a significant portion of the spectrum licensed in the AMTS radio service; the waiver requested would apply only to the limited extent needed to facilitate deployment of Amtrak’s PTC system on approximately 100 kHz of spectrum in 35 specified counties along the eastern seaboard.

It is clear that Amtrak’s Waiver Request is limited both geographically, as well as to specific technical restrictions that would impact its PTC operations in the AMTS band, and even then only as to a very limited portion of any given AMTS licensee’s currently authorized spectrum from which Amtrak’s acquisition might be made. Where, as here, a party seeks relief from specified rules for a very limited purpose, the Commission clearly allows its rules to be waived¹⁶ without a full blown rulemaking process.¹⁷

II. GRANTING THE WAIVER REQUEST WILL NOT CREATE INTERFERENCE ISSUES

H&E also object to the Waiver Request because of the unknown impact of “AMTS operations on VHF high band digital TV operations in general, and digital TV operation on TV

¹⁵ H&E Comments at 1.

¹⁶ The Commission’s rules may be waived for good cause shown, or where unique or factual circumstances would render application of the rules inequitable, unduly burdensome, or contrary to the public interest. See 47 C.F.R. §§ 1.3, 1.925(b)(3)(ii).

¹⁷ It is a well-established principle that administrative agencies have discretion to proceed by either adjudication or rulemaking. See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). As the courts have held, “waiver processes are a permissible device for fine tuning regulations.” See *National Rural Telecom Ass’n v. FCC*, 988 F.2d 174, 181 (D.C. Cir. 1993) (citing *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982)).

Channels 10 and 13 in particular.”¹⁸ Toward this end, they note that Section 80.215(h)(2) of the FCC’s rules requires AMTS stations in close proximity to television operations on these channels to submit a plan to limit interference.¹⁹ In the absence of such a plan in the Waiver Request, H&E urges denial of Amtrak’s Waiver Request.

It must be emphasized that Amtrak is not seeking a waiver of the Commission’s Part 80 interference protection criteria; indeed, the Waiver Request specifically affirmed that Amtrak will observe the requirements of Section 80.215(h)(2) of the Commission’s rules – including the preparation and submission of a plan to limit interference, as necessary, depending on what spectrum Amtrak seeks to acquire from AMTS licensees. Indeed, to the extent Amtrak chooses to construct a new transmission facility that falls within the ambit of Section 80.215(h)(2) due to its relative proximity to a Channel 10 or 13 television station, interested parties will have an opportunity to comment on Amtrak’s site-specific interference mitigation plans. Because the relevant rules remain intact, there is no basis for denying the Waiver Request.

Conclusion

No commenting party has rebutted Amtrak’s showing in the Waiver Request that good cause exists for the grant of the waiver and that the unique or factual circumstances presented by the challenge of implementing PTC along Amtrak’s Northeast Corridor routes would render application of certain technical rules applicable to AMTS inequitable, unduly burdensome, and contrary to the public interest. As the supporting parties have confirmed, grant of the Waiver

¹⁸ H&E Comments at 2.

¹⁹ *Id.* While H&E speculate that even this rule might not protect digital television operations on channels 10 and 13, they do not cite to any studies or consensus of opinion in the engineering community to support this view, nor do they demonstrate how the Commission’s existing mechanisms for addressing interference would be inadequate in this instance.

Request will serve the public interest, convenience and necessity, and would not harm other users. Accordingly, Amtrak respectfully requests that the Commission grant its Waiver Request.

Respectfully Submitted,

National Railroad Passenger Corporation

By: _____

Lawrence J. Movshin
Robert G. Kirk
Brian W. Higgins
Wilkinson Barker Knauer, LLP
2300 N Street, NW, Suite 700
Washington, DC 20037
202.783.4141

Its Counsel

March 21, 2011

CERTIFICATE OF SERVICE

I, Brian W. Higgins, hereby certify under penalty of perjury that the foregoing Reply Comments of the National Railroad Passenger Corporation were served this 21st day of March, 2011 by depositing a true copy thereof with the United States Postal Service, first class postage pre-paid, addressed to:

Warren C. Havens,
President
Skybridge Spectrum Foundation, et al.
2649 Benvenue Ave., #2-6
Berkeley, CA 94704

A handwritten signature in black ink, appearing to read "BWH", is written over a horizontal line. The signature is stylized with a large, circular flourish at the end.

Brian W. Higgins